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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ROBIN BAKER et al., Plaintiffs and Appellants, v. JEFFREY STANDISH, Defendant and Respondent.	B203611 (Los Angeles County Super. Ct. No. MC 017268)

APPEAL from a judgment of the Superior Court of Los Angeles County, Alan S. Rosenfield, Judge. Affirmed.

R. Rex Parris Law Firm, Stephen K. McElroy and Jason P. Fowler for Plaintiff and Appellants.

Morris Polich & Purdy, Dean A. Olson, Richard H. Nakamura, and Maureen M. Home for Defendant and Respondent.

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From a summary judgment in favor of respondent, appellants Robin Baker and Jeffrey Phillip Hanzel appeal contending the trial court improperly weighed the evidence in reaching its decision. Respondent contends the uncontroverted facts established that he did not cause the claimed injury. We find there is no triable issue of material fact as to causation and affirm the judgment.

FACTS AND PROCEDURAL HISTORY[1]

This case arises from a tragic accident. Appellants' 17-year-old son Jeffrey Powers Hanzel (Jeffrey) was killed by a passing car when he attempted to cross State Route 138 (Pearblossom Highway) on his bicycle late at night on July 16, 2004. Appellants assert respondent, their son's friend, either physically pushed Jeffrey or taunted or teased him into crossing the roadway.

Appellants, Jeffrey's parents and successors and heirs, brought this action to recover damages from respondent and others in May 2006. Appellants' second amended complaint alleged that Jeffrey had a pre-existing "brain injury" from a July 2001 accident, and the condition, combined with use of certain medications, left Jeffrey with an "exceptional" mental and physical condition making him more "vulnerable" to the effects of drugs and alcohol, as well as "undue influence" of adults and peers.

Appellants alleged that respondent gave Jeffrey drugs and alcohol on the day of the accident, and that Jeffrey was under the influence of drugs and alcohol at the time

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1 California Rules of Court, rule 8.204(a)(1)(C) mandates that parties support any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears. Instead of heeding this rule, appellants cite only to "Plaintiffs['] Undisputed Facts" to support their statement of facts. Save for stipulated facts, a mere citation to "undisputed facts" without a citation also to the portion of the record where the *evidence* may be found violates well established appellate standards. (See *Grant-Burton v. Covenant Care, Inc.* (2002) 99 Cal.App.4th 1361, 1378-1379.) We may, and accordingly do, disregard appellants' statement of facts in its entirety. (See *McOwen v. Grossman* (2007) 153 Cal.App.4th 937, 947; *Yeboah v. Progeny Ventures, Inc.* (2005) 128 Cal.App.4th 443, 451; *Gotschall v. Daley* (2002) 96 Cal.App.4th 479, 481, fn. 1.)

he was struck. The amended complaint alleged that respondent, "knowing of [Jeffrey's] minority and exceptional pre-existing condition causing him to be vulnerable to influence, drugs and alcohol," bore a duty "not to act in such a way as to expose [Jeffrey] to such risk of harm." Respondent allegedly breached this duty by providing Jeffrey with drugs and alcohol "to the point of intoxication" and then taking Jeffrey on a bicycle ride along Pearblossom Highway late at night and thereafter "taunted and encouraged [Jeffrey] so as to cause him to ride across traffic." The complaint also alleged that respondent left the scene of the accident and failed to render assistance to Jeffrey.

In June 2007, respondent moved for summary judgment arguing that he did not owe Jeffrey a duty and there was no evidence to establish he caused the accident. Respondent also contended he was immune from liability under the law because the consumption of alcohol, not the furnishing of alcohol, would have been the cause of the accident. (See Civ. Code, § 1714; Bus. & Prof. Code, § 25602.)

In support of the motion, respondent relied primarily upon his deposition testimony. Respondent testified at deposition that about two o'clock in the afternoon on the day of the accident, his friend Cory picked him up at work in Cory's car. Jeffrey was a passenger in the car. The three teenagers drove up to South Fork, where respondent's brother and his wife were camping overnight. Respondent and his friends brought no drugs or alcohol with them. While at South Fork, respondent had two beers and Jeffrey had a wine cooler before respondent returned to work for a second shift. Cory, accompanied by Jeffrey, picked respondent up again when he finished work. Cory and Jeffrey had with them a 12-pack of beer. The three drove to a park, where Jeffrey had two beers and respondent several. Afterwards, Cory dropped respondent and Jeffrey off at respondent's home.

Respondent testified that he and Jeffrey decided to ride their bicycles to a convenience store just off Pearblossom Highway, to purchase soda. After buying the soda, they went to a gas station next door where Jeffrey purchased some lotto tickets. The two started riding their bicycles along the Pearblossom Highway headed toward

respondent's home. Respondent crossed the highway so as to travel with the traffic, and Jeffrey followed him. When Jeffrey followed, respondent said to Jeffrey, "Monkey see, monkey do, ha, Jeff?"[2] Respondent and Jeffrey continued to ride together side by side along the paved shoulder of the highway. As they approached 128th Street, respondent saw three cars coming toward them, headed in the opposite direction.

At that point, respondent testified, Jeffrey decided to try to cross the highway before the cars reached them and "slowly veered." When Jeffrey got to "about halfway in the middle of the road," respondent heard the sound of car brakes screeching. He turned around and saw a car skidding and veering to the left, striking Jeffrey's bicycle. Respondent saw the driver stop, and he believed the other cars stopped as well and someone called for emergency help. Scared and in shock, respondent continued riding his bicycle for a short distance. Respondent had no training and did not believe he could assist with Jeffrey. He testified he left the scene after he saw Jeffrey fail to get up.

Respondent testified he did not cause the accident; he did not push Jeffrey or taunt him to cross the highway. He denied giving Jeffrey alcohol on the day of the accident and denied that any of the three smoked "pot" that night. Respondent testified that Jeffrey rode his bicycle without impairment, had no trouble walking or standing and did not slur his words, nor did he have red eyes.

In opposition to the motion for summary judgment, appellants contended that respondent either pushed Jeffrey in front of a moving vehicle or taunted and teased him "knowing he was verbally pushing him [Jeffrey] into the roadway." Appellants asserted that respondent's evidence should be disregarded because he demonstrated a consciousness of guilt by fleeing the scene, lied to police about his presence at the scene, created a false alibi through his grandmother and lied to his friends and at deposition concerning the contents of a declaration he previously executed.

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[2] This is the only evidence of a "taunting" remark made by respondent to Jeffrey.

Appellants claimed there were triable issues of fact as to: (1) how the accident occurred, (2) how Jeffrey ended up in the roadway just before the impact, (3) whether respondent provided Jeffrey with alcohol and/or drugs, and (4) whether Jeffrey consumed or was under the influence of drugs or alcohol at the time of the accident.

In opposing the motion for summary judgment, appellants offered a declaration of respondent dated May 2006.[3] In his declaration, respondent stated that Jeffrey just started "drifting" over the yellow line in the center of the highway before he was hit. Respondent declared that Jeffrey did not make a 90-degree turn but "cut back across the highway at about a 45[-]degree angle." He also stated that he failed to come forward earlier because he was on probation and had been drinking, and he feared he would be arrested or charged with violation of his probation.[4] He denied pushing Jeffrey or doing anything to cause the accident.

In support of their contention that respondent pushed Jeffrey in front of the moving vehicle, appellants cited the police report and appellant Baker's testimony that after the accident an officer asked her, "'Why was your son pushed into the road in front of a car?'"[5]

The driver was deposed and testified he saw the two young men riding their bikes next to each other along the shoulder of the road about 100 or 200 meters ahead. He stated that Jeffrey "out of nowhere decided to make a left." When questioned whether Jeffrey made a 90-degree turn, the driver responded, "I don't understand." Counsel then attempted to clarify his question, saying, "When I say 90 degrees, meaning he's going straight and all of a sudden he goes directly?" The driver responded, "Yes." The driver said he slammed on his brake but there was not time to

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3 Respondent apparently gave this declaration to appellants' investigator so that Jeffrey's mother could have "peace of mind."

4 Respondent understood a violation of his probation would mean imprisonment.

5 The court excluded such evidence, together with a declaration of the investigating officer, which respondent proffered in rebuttal, on grounds of hearsay.

avoid the collision. When specifically questioned on whether Jeffrey made a left turn or was pushed, the driver stated, "he *did turn* . . . left." [6] (Italics added.)

Appellants also relied on respondent's admission in his deposition that he was involved in a car accident after Jeffrey's death. Respondent testified he did not leave the scene then, even though he had been drinking alcohol, because it was not his fault and, even if he had violated probation, he believed it would only be a minor infraction.

In arguing that the case should go to a jury, appellants' counsel asserted that respondent's testimony provided circumstantial evidence of respondent's culpability, stating, "whether or not he was taunting, teasing -- teasing him, encouraging into the roadway, either physically or verbally, by pushing, whether or not it was a joke, we don't know, but it's clear based upon his action that he had some involvement in -- in the demise of the decedent." The trial court disagreed, saying, "I see a lot of things that say [respondent] lied, he's a bad guy, but I can't see anything that says he brought about this other poor fellow's death." The court stated there was "a lot of smoke in the air" but no evidence showing that respondent brought about Jeffrey's demise.

The court therefore entered judgment for respondent, and appellants appealed.

CONTENTIONS

Appellants contend respondent owed a duty to Jeffrey to protect him from harm after serving Jeffrey with alcohol with the knowledge that Jeffrey was vulnerable to alcohol. Alternatively, appellants assert that there are triable facts (1) whether respondent provided the alcohol that evening, (2) whether Jeffrey was intoxicated, (3) whether it can be inferred respondent had a guilty conscience, and (4) what caused Jeffrey to turn onto the highway.

STANDARD OF REVIEW

A motion for summary judgment shall be granted if all the papers that are submitted show there is no triable issue as to any material fact and that the moving

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[6] Neither respondent nor the driver ever testified or suggested that Jeffrey's turn onto the highway was involuntary.

party is entitled to a judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment must show either that one or more elements of the cause of action cannot be established, or that there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853 (*Aguilar*).) A defendant moving for summary judgment must present evidence that would require a reasonable trier of fact *not* to find any underlying material fact more likely than not. (*Aguilar*, *supra*, at p. 851.) If that burden is met, the burden shifts to the plaintiff to show a triable issue of one or more *material* facts exists as to such cause of action or defense. (*Id.* at p. 850; Code Civ. Proc., § 437c, subd. (p)(2).)

On an appeal from the grant of summary judgment, we review the record de novo considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) However, we apply the abuse of discretion standard to the trial court's exercise of discretion when summary judgment turns on the sole declarant's credibility or state of mind. (See Code Civ. Proc., § 437c, subd. (e) [trial court has discretion to deny summary judgment "where a material fact is an individual's state of mind, or lack thereof, and that fact is sought to be established solely by the individual's affirmation thereof"]; *City of South Pasadena v. Department of Transportation* (1994) 29 Cal.App.4th 1280, 1288 ["The only exception to the independent review standard applies when we review a trial court's exercise of discretion as allowed" by the statute]; 6 Witkin, Cal. Procedure (5th ed. 2008) Proceedings Without Trial, § 262, p. 709.) With that exception, we assume the role of a trial court and apply the same rules and standards governing a trial court's determination of a motion for summary judgment. (*Lenane v. Continental Maritime of San Diego, Inc.* (1998) 61 Cal.App.4th 1073, 1079.)

DISCUSSION

No Triable Issue as to Causation

Although cast as separate causes of action for wrongful death and personal injuries, the gravamen of appellants' claim is negligence. To recover for negligence, a plaintiff must prove "'"(a) a *legal duty* to use due care; (b) a *breach* of such legal duty; [and] (c) the breach as the *proximate or legal cause* of the resulting injury."'" (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917.) To recover on a theory of negligence, therefore, a plaintiff must prove duty, breach, causation, and damages. (*Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 614; *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 489 (*Leslie G.*); see also *Truong v. Nguyen* (2007) 156 Cal.App.4th 865, 875.)

The threshold element of a negligence cause of action is the existence of a duty of reasonable care. (*Paz v. State of California* (2000) 22 Cal.4th 550, 559.) Appellants' first two claimed "triable issues" of fact relate to whether respondent owed a duty to Jeffrey. Logically, we would ordinarily address appellants' contention that respondent owed Jeffrey a duty under the circumstances. We do not address the duty issues here, however, because it is clear appellants cannot establish the causation element to recover for negligence against respondent.

We accordingly focus on appellants' contention that there are triable issues concerning respondent's alleged act of either pushing or taunting Jeffrey to cross the highway. A plaintiff satisfies the causation element for negligence by establishing (1) the defendant's breach of duty, by a negligent act or omission, was a substantial factor in bringing about the plaintiff's harm, and (2) no rule of law relieves defendant of liability. (*Leslie G., supra*, 43 Cal.App.4th at p. 481.) Causation may be decided as a question of law if based on undisputed facts and no room for a reasonable difference of opinion exists on the evidence submitted. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 775-776 (*Saelzler*).)

Respondent's declaration and deposition both recount the same crucial facts on the issue of whether Jeffrey was pushed or taunted to cross the highway.

Respondent's evidence showed Jeffrey rode at respondent's side on the shoulder of the highway and on his own volition turned his bicycle to cross the highway without any prompting or action by respondent. The only taunting comment respondent addressed to Jeffrey was made some minutes before, after Jeffrey had crossed the highway following respondent. There was no evidence respondent prompted Jeffrey to cross the highway again or pushed him into the roadway. Respondent stated both in his declaration and in his deposition that he did not cause the accident; he did not push Jeffrey or taunt him to cross the highway.

Appellants contend that respondent's "self-serving" deposition testimony and statements should not have been considered or credited by the trial court under Code of Civil Procedure section 437c, subdivision (e). We disagree. Respondent's deposition occurred in February 2007, nearly nine months after he signed his declaration. During this interval, the parties had an ample opportunity to conduct investigations and take discovery. At respondent's deposition, all parties presumably had the opportunity to examine respondent and evaluate his testimony based on his prior declaration statements. The trial court properly took respondent's testimony and statements into account, particularly since his recollection was buttressed by the testimony of the driver, who also witnessed the events. The driver's testimony was remarkably consistent in crucial respects with respondent's own recollection of the accident. The driver testified he could "clearly see" the two friends riding on the shoulder of the road ahead of him from a distance of about 100 to 200 meters. As far as he could see, before the accident, the two were riding next to each other to the right of the white line for the driver's lane of traffic. The driver stated that Jeffrey decided to make a left "out of nowhere."[7] The driver testified he reacted instantly by slamming his brakes, but there was no room to avoid the accident. We find nothing on

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[7] Reenacting the accident, the driver indicated, "I was going and he [Jeffrey] just made the left and *that's all that happened*." (Italics added.)

this record to establish a triable issue of material fact concerning the cause of the accident.

Appellants point to respondent's propensity to lie and lack of credibility. They rely on *Donchin v. Guerrero* (1995) 34 Cal.App.4th 1832, 1841 (*Donchin*), a dogbite case, quoting the case to the effect that "a false exculpatory statement is evidence of a guilty conscience in the context of criminal cases." But, as we explained in *Doe v. Salesian Society* (2008) 159 Cal.App.4th 474, 480, the lynchpin of the *Donchin* decision was the defendant landlord's initial false exculpatory statement, which led to the logical inference that the landlord lied because he knew about the dogs' dangerous propensities. There is no similar logical chain here. Respondent lied about being present at the scene. He later admitted that he was present. But respondent's presence or absence at the scene has no bearing on his liability, unlike the false denial in *Donchin*. Nor is there any chain of reasoning beginning with respondent's statements that would lead to a reasonable inference that he pushed Jeffrey or taunted him into harm's way.

Appellants argue that because a reasonable factfinder "**could**" find for appellants, summary judgment should have been denied. To controvert a moving party's showing, there must be some *evidence* of causation rather than pure speculation, imagination, guess work, or mere possibilities. "'[P]roof of causation cannot be based on mere speculation, conjecture and inferences drawn from other inferences to reach a conclusion unsupported by any real evidence . . . .'" (*Saelzler, supra*, 25 Cal.4th at p. 775, quoting *Leslie G.*, *supra*, 43 Cal.App.4th at p. 488.) In the present case, there is no direct evidence -- indeed, no evidence at all -- showing respondent was the legal cause of Jeffrey's injury and death.

Respondent's conduct in fleeing, securing a false alibi, lying to the police and lying to his friends is not worthy of a medal. But, to paraphrase our Supreme Court, no matter how inexcusable a defendant's act or omission might appear, a plaintiff must nevertheless show the act or omission caused, or substantially contributed to, the injury; otherwise, a defendant might be held liable for conduct that actually caused no

harm. (*Saelzler*, *supra*, 25 Cal.4th at p. 780.) When a plaintiff seeks to prove an essential element of the plaintiff's case by circumstantial evidence, the plaintiff "must show that the inferences favorable to her [or him] are *more reasonable or probable* than those against her [or him]. [Citations.]" (*Leslie G.*, *supra*, 43 Cal.App.4th at p. 483.) And a defendant need not "conclusively negate" an essential element of the cause of action; he need only show the plaintiff "does not possess, and cannot reasonably obtain, needed evidence." (*Aguilar*, *supra*, 25 Cal.4th at pp. 853-854.)

Because appellants have failed to overcome respondent's showing, we hold the evidence fails to establish causation as a matter of law.

DISPOSITION

The judgment is affirmed. Respondent is to recover costs on appeal.

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FLIER, J.

We concur:

RUBIN, Acting P. J.

BIGELOW, J.